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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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JAN 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-266
and Competition Act of 1992	)	
	)	
Rate Regulation	)	

COMMENTS OF THE FALCON CABLE GROUP

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SUMMARY

In establishing effective competition regulations, the FCC should apply the thirty percent penetration test to total homes in the franchise area, not homes passed, and should not consider whether the franchise requires all residents to be served. Likewise, the test regarding competitive service offerings to fifty percent of franchise area households should reflect service that is technically capable of being provided, not just where it is being marketed.

Basic cable service regulations should permit cable operators to change the mix of basic and non-basic tiers. Congress intended only one basic tier to be subject to local rate oversight. Broadcast "superstations" received by microwave should not be required on basic if they are also available via satellite. PEG channels should only be included if they are required by the franchise.

Franchising authorities have discretion to decline to seek basic rate regulation certification. Unless franchising authorities seek such certification and the Commission denies or revokes certification, the Commission has no authority to regulate basic rates. The 1992 Cable Act does not permit franchising authorities to regulate basic rates without legal authority under state law and local franchises.

The Commission's basic rate formula should be simple to administer, should not rely on cost or other financial data, and should permit a reasonable profit. Falcon supports the concept of a benchmark proposal as the primary method of assessing rates

for basic service. Benchmarks should be calculated on a per-channel basis, and should not contain an overall rate cap. They should be adjusted annually for inflation, based on the Consumer Price Index ("CPI") or the admissions component of the CPI. Cost of service regulation should, however, be available to be used as a "safety net" to justify rates that exceed the benchmarks.

Falcon urges the Commission to consider the use of a net income and free cash flow test as an intermediate step before using a cost-of-service test for those situations where a cable operator must attempt to justify the fact that its basic service rate exceeds the applicable benchmark rate. Free cash flow is a commonly-used measure of financial performance. It is much easier to demonstrate and evaluate than a cost-of-service showing, it does not require use of extensive uniform accounting regulations and it provides a definitive answer.

Regulation of equipment rates should be based on the service received. Only equipment used solely to receive basic service is regulated based on actual cost. Actual cost pricing includes installation, amortization, maintenance, financing, general administrative overhead, and a reasonable profit. Equipment used to receive cable programming service is regulated if found to be "unreasonable" pursuant to a valid complaint. Equipment used to receive pay programming is unregulated. Equipment should also be subject to an "effective competition" standard, whereby equipment rates would be deregulated if available from independent sources.

Bundling of converters and remotes should be permitted. Moreover, the Commission should evaluate prices for all basic equipment, including converters and remotes, additional outlets ("AOs"), service calls, and installations in a "basket" whose overall rate, rather than individual component rates, would be subject to the Commission's standards. Bundling of non-basic equipment and service is permitted under the 1992 Cable Act.

Cable operators should be allowed to establish flexible hourly installation rates, which would be deemed reasonable if they do not exceed a benchmark, such as telco labor rates. Installation and maintenance of AOs should be subject to the same standard as equipment installations. The service aspect of AOs is governed by the 1992 Cable Act's rate regulations, depending on the service received by each AO.

Itemization on separate lines of all costs identified under the 1992 Cable Act, including PEG access support payments, franchise obligations, franchise fees, retransmission consent payments, taxes and other governmental assessments, should be permitted. Basic rate increases should be implemented after 30 days notice. The FCC, not the courts, should handle disputes regarding implementation of the rate standards to provide national guidance. Only refunds of non-basic rates are provided for in the 1992 Cable Act. If basic rates are found unreasonable after all showings have been considered, the operator should have discretion to reduce the rate or add sufficient services to meet the benchmark.

Non-basic rate standards are designed to catch only "bad actors." Complaints should involve overall rates, not just the non-basic tier, to account for the operator's allocation of costs, etc. Simple packaging of services (e.g., a la carte, multi-pay discounts, multiplexing) does not constitute cable programming service and is not subject to regulation. If rates are found unreasonable, i.e., exceed the benchmark and the operator is unable to demonstrate their reasonableness in another fashion, the operator should have discretion either to roll back rates or add additional services to meet the benchmark. Benchmarks must take the size and penetration of the tier into consideration so as not to disfavor niche services. In considering refunds or rate rollbacks, the Commission must avoid rate regulation which could be deemed unconstitutional takings under the Fifth Amendment.

The 1992 Cable Act's uniform rate and discrimination provisions apply only to rates charged by cable operators, not to the total bill. They also apply only to similarly situated customers (except for geographic area), not to bulk, institutional, or other special classes. The applicable geographic area includes all territory served by a cable system, except where the system serves multiple franchise areas which charge different non-itemizable government assessments. Similarly, an exception to geographic uniformity should be made where the franchising authority mandates different rates.

Negative options are limited to situations where subscribers are billed, without their consent, for a new service to which they did not already subscribe. Likewise, evasions are limited to implicit rate increases associated with tiering services that result in less service for the same per-channel price.

Small systems (i.e, 1,000 or fewer subscribers measured on a franchise basis) should be exempted from the Commission's rate regulations, or at least given a 10 percent cushion above the applicable benchmarks, given relief from reporting requirements, have separate rate benchmarks for small systems, and require joint certification for all communities served by such systems which seek to regulate basic rates.

Grandfathered basic rate agreements must be enforceable by the franchising authority or the cable operator regardless of the resulting rates. Cable programming service rates should be subject to review exclusively by the Commission.

The Commission's data collection should take place on a single form. Data collection should be system, not franchise, based. Cost data should not be routinely collected if cost-of-service regulation is not the norm.

The Commission should adopt a transition timetable for its rate regulation rules, in order to allow time for the necessary steps to be taken and to avoid disruptions to cable operators and consumers. In no event should the rate regulation regime take full effect before January 1, 1994.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)))))))	MM Docket No. 92-266

COMMENTS OF THE FALCON CABLE GROUP

The Falcon Cable Group ("Falcon") hereby respectfully submits these comments to the above-captioned Notice of Proposed Rulemaking ("NPRM") regarding implementation of the rate regulation provisions contained in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "Act").[1]

INTRODUCTION

Falcon consists of several partnerships, both public and private, which own and operate cable television systems serving more than 800,000 subscribers in over 750 communities throughout the United States. Falcon is extremely conscious of its role in bringing the best possible cable entertainment, information and technology to the communities it serves. A fundamental Falcon philosophy is the belief that all Americans, regardless of an

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[1]Pub.L. 102-385, 106 Stat. 1460 (1992), amending the Communications Act of 1934, 47 U.S.C. §151 et seq.

area's population or remoteness, should have access to an abundance of programming choices.

Although Falcon is a sizeable company by gross subscriber standards, Falcon's position is unique. Its systems average only about 1,000 subscribers per franchise community. Thus, Falcon is a collection of small systems. The costs and administrative burdens which might be imposed under a rate regulation regime could be overwhelming to small systems. The Commission must therefore proceed with great caution in establishing regulations for cable service and equipment rates.

I. EFFECTIVE COMPETITION TEST

The 1992 Cable Act exempts cable systems from regulation of their basic service rates if the FCC finds that the cable system is subject to effective competition. A cable system is considered subject to effective competition if any one of three tests is met.[2] One, if less than 30 percent of the households in the franchise area subscribe to cable service. Two, (i) there are "at least two unaffiliated multichannel video distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area;" and (ii) the number of households that subscribe to such distributors, excluding the largest distributor, is greater than 15 percent of the total number of households in the franchise area. Three, if the franchising authority is itself a multichannel video program

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[2] 47 U.S.C. §543(l)(1).

distributor and offers its programming to 50 percent or more of the total number of households in the franchise area.

Rules implementing these tests should reflect the realities of cable television service and its competitive environment. A cable television operator in a single franchise area may serve many different types of customers, from a single family home to a multi-story apartment complex. The cable operator faces competition from many different sources which may target diverse segments of the cable franchise area.

Falcon concurs with the statement in ¶7 of the NPRM that effective competition should be found to exist where less than 30 percent of the homes in the franchise area subscribe to cable television service. The statute clearly establishes that the relevant base is the "households in the franchise area."[3] Thus, considerations of how many homes are actually passed by the cable system or whether the operator is required to build cable plant to all portions of the franchise area are not relevant for the first effective competition test.

The second test for effective competition measures the threat to the cable operator's service by rival multichannel video programming distributors. The cable operator may face competition from such multichannel video programming distributors as other cable operators, multichannel multipoint distribution service ("MMDS"), television receive-only satellite program distributors ("TVROs"), direct broadcast satellite ("DBS"),

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[3] 47 U.S.C. §543(l)(1)(A).

satellite master antenna television ("SMATV"),[4] telephone video dialtone service,[5] and local multipoint distribution service ("LMDS").[6] These alternative providers vary in their approach to service and often target only a segment of the total population in the community. Thus, the cable operator may face greater degrees of competition from various multichannel video providers in different segments of the franchise area. FCC rules need to be flexible to provide cable operators with deregulated status in any segment where the effective competition test is satisfied.

An excellent example of segmented competition is presented by the situation in multiple dwelling units ("MDUs"). A franchise area may contain many MDUS which can be served by either the franchised cable operator or a SMATV or MMDS operator. The SMATV or MMDS operator may have no plan to offer service

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[4]Although SMATV is not specifically mentioned as an example of a "multichannel video programming distributor" in §602(12) of the Act, it does meet the general definition of one who "makes available . . . multiple channels of video programming."

[5]Video dialtone service would permit video programmers to use the local telephone access to households to "provide either single or multichannel services." In the Matter of Telephone Company - Cable Television Cross-Ownership Rules, 63.54 - 63.58, <u>Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking</u>, 7 FCC Rcd 5781, ¶2, n.3 (1992). If multiple channels of video programming are offered, video dialtone should be considered a multichannel video programming distributor.

[6]The FCC has not yet licensed LMDS service. However, the Commission has recognized that the most significant use of LMDS service will be to provide video services in competition with cable television operators. Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, <u>Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration</u>, CC Docket No. 92-297 ¶16 (released January 8, 1993).

throughout the franchise area and is under no franchise obligation to offer such services. In many communities, MDU households are a minority of the total number of households and so the SMATV or MMDS operator can offer service to every MDU without triggering the 50 percent "offer" figure of the second test. Effective competition rules that would consider an entire franchise area as the competitive market, and thus impose rate regulation as to the MDU segment, would handicap the cable operator because it could not compete fairly with an unregulated MMDS or SMATV operator. Thus, the FCC should grant cable operators limited deregulated status where competitive video programmers meet the 50 percent and 15 percent measures with respect to the MDU segment of the franchise area.

The definition of "households" should include the number of possible subscriber units in each MDU in the franchise area. The NPRM at ¶8 states that, with respect to the second and third tests for effective competition, "[w]e plan to count each separately billed or billable customer as a 'household'. . ." This is not an adequate measure of the total number of separate "households". In the case of MDUs, the apartment dweller may pay its landlord for the right to service or it may be incorporated within the rental fee. Under the NPRM's definition of household, these MDUs may only be counted once if the cable operator bills only the landlord on a "bulk" basis. Alternatively, the landlord may not have such an agreement with the cable operator and so each apartment dweller would be counted as an individual household under the NPRM's definition. The FCC should take MDU agreements into account and adopt a consistent definition that counts each dwelling unit that receives authorized access to cable service as a "household."

In the NPRM, the FCC tentatively concludes that 50 percent of the households are "offered" video programming when it is "actually available" to those households.[7] This standard, however, may induce competitive video distributors to not offer service to certain areas or groups of potential customers in order to keep the cable operator subject to rate regulation. The FCC instead should rule that video programmers "offer" programming to a household when they are technically capable of providing their service to that household. Under this definition, a competitor may reach the 50 percent "offer" threshold when it first begins service, although the effective competition test would not be met until a 15 percent subscription level was reached in the households of the franchise area.

The NPRM at ¶9, n.15, seeks comment on whether the fifteen percent threshold may be met by accumulating the market shares of two or more competitors to the cable operator. The statute clearly provides that the fifteen percent test is to be determined by calculating the percent of total households "subscribing to programming services offered by multichannel video programming <u>distributors</u> other than the largest multichannel video programming distributor."[8]

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[7]NPRM at ¶8.

[8]47 U.S.C. §543(l)(1)(B)(ii) (emphasis added).

The NPRM at ¶9 seeks comment on whether a minimum amount of programming or number of channels is necessary to be deemed "comparable" to cable television service for purposes of the second effective competition test. One sound approach to this issue mentioned in the NPRM is that competitive services would be presumed to offer comparable video programming if the competitive services reach levels of subscriber penetration of 15 percent or greater. If competitors are gaining at least 15 percent of potential subscribers, the competitive services must be deemed comparable to cable television services or they would not achieve such high consumer acceptance. This is an objective and fair test which avoids making any content-based determinations.

II. BASIC CABLE SERVICE REGULATION

A. Components of Basic Service Subject to Regulation.

1. <u>Cable operators retain the unlimited right to add, delete or change the mix of services on basic and non-basic tiers</u>.

Section 623(b) of the Act gives the Commission the job of implementing Congress' desire that the rates cable operators charge for the basic tier of service are reasonable. This goal cannot be achieved if franchising authorities can require cable operators to include various services on the basic service tier.

The right of cable operators to move different programming services in and out of both basic and non-basic tiers is acknowledged by Section 623(h) of the 1992 Cable Act which specifically contemplates retiering.[9] Furthermore, the basic service definition contained in Section 623(b)(7) of the Act may well require cable operators to retier their service offerings in order to bring their basic service tier into line with the 1992 Cable Act basic tier requirements.

In addition to prescribing the minimum contents of basic service tiers and permitting additions to those tiers, Section 623(b)(7) also preempts any franchise provisions requiring cable operators to include specific broadcast and non-broadcast services on the basic service tier. For instance, under the provisions of Section 325 of the Act, local commercial broadcast stations may elect to negotiate for carriage of their signals (retransmission consent) rather than asserting their must-carry rights under Section 614. Distant signals could only be carried if retransmission consent was obtained. If no agreement is reached between the broadcaster and the cable operator, the result would be that that broadcast station could not be carried on the basic service tier. Thus, the 1992 Cable Act implicitly preempts any franchise requirements that specify the content of the basic service tier.

2. Congress intended that there should be only one basic tier subject to local rate oversight.

Section 623(b)(7)(A) of the Act sets out the minimum content that cable operators are required to offer to subscribers on "a separately available basic service tier to which subscription is

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[9] See 47 U.S.C. §543(h) (directing the Commission to establish methods for preventing rate regulation evasions resulting from retiering).

required for access to any other tier of service." The basic service tier, as Congress intended, is the only tier subject to local regulation and is also intended to be the only tier to which cable operators may require subscription "as a condition of access to video programming offered on a per channel or per program basis."[10] Although the definition of "basic cable service" included in the 1984 Cable Act was left unchanged in the 1992 Cable Act, under the new Section 623 of the Act, Congress has mandated that "basic cable service" be placed on an initially available "low priced tier of programming."[11] Furthermore, the 1992 Cable Act makes no mention of multiple basic service tiers. It appears quite clear that "Congress intended the existence of only one such tier."[12]

As the Commission correctly notes, the court of appeals has held that cumulative tiers of services (e.g., basic tier + second tier offered together for one price = basic service tier) would be subject to rate regulation.[13] Under this interpretation of the 1984 Cable Act, a cable operator could offer all tiers as basic service tiers simply by including the basic service tier in all successive tiers and marketing and pricing its tiers on a cumulative basis, rather than marketing and pricing successive

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[10] 47 U.S.C. §543(b)(8)(A).

[11] 47 U.S.C. §543(b)(7)(A); see also H.R. Rep. No. 628, 102d Cong., 2d Sess. 82 (1992) ("House Report").

[12] NPRM at ¶13.

[13] NPRM at n.24 (citing American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987))("ACLU").

service tiers separate and apart from the basic tier. Employing such a scheme, a cable operator could effectively evade the buy-through prohibition and thus frustrate Congress' desire that no subscriber be forced to buy upper tiers of service as a condition to obtaining premium or pay-per-view programming. It is apparent, therefore, that Congress intended that the new law provide for a single basic service tier and to the extent that the ACLU decision is inconsistent with that intent, the 1992 Cable Act should be read as overruling that decision.

Finally, despite the obvious intent of Congress that there be no more than one level of basic service subject to local rate regulation, Section 623 does not prohibit cable operators from offering an expanded tier that includes the basic tier of service. So long as a basic service tier is separately available, separately priced, and is the only tier of service to which subscription would be required as a condition of access to other programming services, cable operators may offer an expanded basic service tier. The incremental portion of such an expanded basic tier would not be subject to local regulation as part of the basic tier of services, but would be subject to regulation by the Commission pursuant to Section 623(c) if alleged to be unreasonable. Again, to the extent that the ACLU decision is inconsistent, the 1992 Cable Act should be read as overruling that decision.

3. Specific components of basic service tier.

Section 623(b)(7)(A)(iii) of the Act provides that cable operators are not required to carry on their basic service tier any television broadcast signals which are "secondarily transmitted by a satellite carrier beyond the local service area of such station." Congress apparently intended by this provision that cable operators not be required to carry on their basic service tier any superstations and other broadcast stations whose signals are not received over-the-air. Congress' focus in this regard was not on the means by which superstation signals are delivered, but rather on the distinction between the nature of carriage of such stations' signals and that of local broadcast station signals. This interpretation is supported by the reference in the Conference Agreement to the deletion from the House amendment of the requirement that cable operators carry "any television broadcast station signal . . . on the basic tier, including superstations."[14] Such deletion clearly leaves to the discretion of the cable operator the question of whether and upon which tier superstations and other television station signals secondarily transmitted by a satellite carrier are carried. The Commission's rate regulation rules should make clear, however, that this freedom extends to a cable operator's carriage of superstations, and other broadcast stations, whose signals are secondarily transmitted by microwave, as well as those whose signals are secondarily transmitted by satellite carrier. Any distinction between signals that are received via satellite and those that are received via microwave would be totally arbitrary. It would elevate form over substance and would impose upon a

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[14]See H.R. Conf. Rpt. No. 862, 102d Cong., 2d Sess. 64 (1992) ("Conference Report").

cable operator receiving television broadcast station signals via microwave the unnecessary costs associated with shifting delivery systems simply to take advantage of the freedom allowed a cable operator receiving such signals via satellite.

The Commission tentatively concludes in the Must Carry/Retransmission Consent Proceeding NPRM[15] that local television stations carried on the basic service tier pursuant to such stations' exercise of retransmission consent rights in lieu of mandatory carriage may be counted by a cable operator to meet the signal carriage requirements of Section 614 of the Act. A broadcast station does not lose its "local" identity simply because it pursues its retransmission consent rights rather than its must-carry rights and it therefore should count toward the Act's mandatory carriage provision. Retransmission consent signals must, accordingly, unless exempt under Section 623(b)(7)(A)(iii), be included on the basic service tier.

Finally, the 1992 Cable Act states that cable operators are required to carry on their basic service tier "any public, educational, or governmental ("PEG") access programming required by the franchise of the cable system to be provided to subscribers."[16] If a franchising authority has not required the provision of PEG access channels on the basic service tier, a cable operator should not be required by the Commission's rules

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[15]See Implementation of the Cable Television Consumer Protection Act of 1992, Broadcast Signal Carriage Issues, MM Docket No. 92-259, FCC 92-499, released November 19, 1992 at ¶54.

[16]47 U.S.C. §543(b)(2)(A)(ii).

to include the PEG access channels on the basic tier. To that end, the legislative history of the 1992 Cable Act specifically states that the Conference Committee did not intend "to modify the terms of any franchise provision either requiring or permitting the carriage of such programming on a tier of service other than the basic service tier."[17] As this matter has clearly been left by Congress in the hands of franchising authorities, the Commission is precluded from requiring cable operators to place PEG channels on the basic service tier where the operator's franchise contains no such requirement.

B. Qualification of Franchising Authority

1. The FCC has no jurisdiction to regulate basic cable service rates where the franchising authority chooses not to certify to regulate those rates.

Section 623(a)(2)(A) of the Act states that the FCC has jurisdiction to regulate basic cable service rates only in accordance with Section 623(a)(6).[18] The FCC's limited jurisdiction under paragraph (6) is permitted only in two circumstances: when the FCC disapproves a franchising authority's certification request or when the FCC revokes the certificate of a franchising authority.[19] Further, FCC jurisdiction ceases once a rejected franchising authority has been successfully certificated by the FCC.[20]

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[17]House Report at 85.

[18]47 U.S.C. §623 (a)(2)(A).

[19]47 U.S.C. §543(a)(6).

[20]Id.

Thus, in cases where the franchising authority chooses not to impose rate regulation on the cable operator and so does not file for certification, the FCC does not have jurisdiction to unilaterally impose basic service rate regulation. This conclusion is confirmed by the House Report which states:

> Subsection (a)(6) specifies the scope of the FCC's authority to regulate basic cable rates in lieu of a franchising authority. The FCC may exercise regulatory authority with respect to basic cable rates *only* in those instances where a franchising authority's certification has been disapproved or has been revoked and only until the franchising authority has qualified to exercise that jurisdiction by filing a valid certification.[21]

Accordingly, it is clear from both the 1992 Cable Act and its legislative history that the FCC has no jurisdiction to regulate basic cable rates where a franchising authority has not filed for certification to do so.

2. A voluntary withdrawal of certification by a franchising authority does not trigger FCC jurisdiction to regulate basic rates.

Since the FCC may regulate basic cable service rates only when the FCC revokes or disapproves of the certification of a franchising authority, if the franchising authority chooses not to regulate basic service rates after it has received FCC certification, then the FCC has no jurisdiction to regulate under Section 623(a)(6).

FCC jurisdiction under the 1992 Cable Act when certification is withdrawn is very different than when certification is revoked. A withdrawal indicates that the FCC has approved the franchising authority's prior request for basic cable service

[21] House Report at 81.

rate regulation under Section 623(a)(4) of the Act, but the franchising authority has decided not to exercise that rate regulating power.[22] By comparison, a revocation results when the FCC determines that a certified franchise authority is regulating in a manner inconsistent with FCC rules promulgated under Section 623(b). Thus, FCC jurisdiction in the case of a revoked certification is proper because the franchising authority has been found by the FCC to be unfit to regulate. In the case of a withdrawn certification, however, the franchising authority makes a discretionary decision to not exercise its right to regulate. Therefore, FCC jurisdiction does not attach when a franchising authority decides to withdraw its certification.

3. <u>FCC must establish grounds for denial or revocation of certification</u>.

The 1992 Cable Act requires that the franchise authority have the legal authority to adopt regulations consistent with the FCC basic rate regulations.[23] The NPRM at ¶20 seeks comment on the meaning of the provision requiring that franchising authorities have legal authority to regulate. This clause, separate from the requirement of consistency with FCC regulations, can only mean that the franchising authority must have the necessary power to regulate under state or local law.

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[22]Franchising authorities are not obligated to regulate basic service rates; the 1992 Cable Act gives them the right to regulate if they so choose. <u>See</u> House Report at 81 ("all franchising authorities . . . shall have the right to regulate basic cable service rates if they meet the conditions of section 623(a)(4).")

[23]47 U.S.C. §543(3)(A) & (B).

In most cases the franchising authority is a municipality or town which derives its power to regulate from the state. Municipal law is completely subject to the will of the state legislature. In such cases, state law may prohibit regulation of basic cable service rates or may not authorize the municipality to regulate basic cable service rates. If so, then the franchising authority does not have legal authority to adopt rate regulations. The franchise authority's lack of legal authority is proper grounds for the FCC to disapprove a request for certification under Section 623(a)(4)(B) of the Act.

Related to the issue of state authority to regulate basic cable rates, the NPRM seeks comment on whether the exercise by the FCC of its basic rate regulation power under Section 623(a)(6) of the Act in communities which cannot engage in rate regulation should be deemed a preemption of local law.[24] Since Congress made local legal authority a condition for basic rate regulation by franchising authorities, it could not have meant for the FCC to bypass this condition. The 1992 Cable Act does not constitute an express grant of legal power to those franchising authorities not possessing such power under local law. The opposite conclusion, that the FCC can regulate when a municipality without state authority attempts and fails to certify, would in practice render Section 623(a)(3)(B) of the Act meaningless. The application for certification by unauthorized franchising authorities would simply be an invitation for the FCC

[24]NPRM at ¶20.